# Risk-X Sdn Bhd v Capital Market Risk Advisor Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22IP-5–03 OF 2015
AZIZAH NAWAWI J
12 OCTOBER 2016

*Copyright — Infringement — Computer software — Plaintiff claimed ownership of computer software and sued defendants for infringement of copyright, passing off, breach of confidential information and conspiracy to injure — Whether plaintiff's allegations proven*

*Tort — Conspiracy — Conspiracy to injure plaintiff — Plaintiff claimed ownership of computer software and sued defendants for infringement of copyright, passing off, breach of confidential information and conspiracy to injure — Whether there was agreement between defendants to set up first defendant with intention to injure plaintiff*

*Tort — Passing off — Goodwill and misrepresentation — Plaintiff claimed ownership of computer software and sued defendants for infringement of copyright, passing off, breach of confidential information and conspiracy to injure — Whether there was mark, trademark, get-up or other indicia which was owned by plaintiff to indicate and identifies goodwill of plaintiff's computer program — Whether there was misrepresentation by defendants*

The plaintiff claimed that it was the owner of a computer program called 'ORMSv.6' whereas the first defendant claimed ownership of a computer program called the Financial Risk Adviser (FRA) Market Surveillance Risk Management ('FRA'). It must be noted that the second, third and fourth defendants were former employees of the plaintiff and currently served as the first defendant's employees. Based on a letter by the plaintiff to a company known as PM Securities Sdn Bhd, the plaintiff alleged that the FRA was a source code, scripts and design of the plaintiff's product known as ORMSv.6. Subsequently, the plaintiff brought the present suit against the defendants claiming for injunctive reliefs and damages on the grounds of: (a) infringement of copyright; (b) passing off (c) breach of confidential information; and (d) conspiracy to injure. In support of its claim of ownership of ORMSv.6, the plaintiff relied on the evidence of PW1 that the plaintiff had purchased ORMSv.6 from a company known as Global Intelligence ('Global'), nonetheless, the evidence of PW1's was not pleaded in the plaintiff's amended statement of claim. With regards to damages, the plaintiff claimed specific damages in the sum of RM5.5m arising from the termination of contract by

Kenanga Investment Bank Bhd; and RM4.5m arising out of termination by Public Investment Bank.

**Held**, dismissing the plaintiff's case with costs:

(1) The plaintiff had failed to establish that it was the copyright owner of ORMSv.6 as the evidence that it owned the copyright after purchasing the same from Global could not be considered as it was not pleaded. There was no evidence to prove that the plaintiff was the owner of ORMSv.6. Further, there was no evidence at all to establish an infringement. There was no analysis made to both computer programs in order to ascertain the substantive similarity, when viewed objectively. In the premise, the plaintiff had failed to prove copyright infringement of its computer program by the defendants (see paras 18, 20 & 31).

(2) With regards to passing off, there was no mark, trademark, get-up or other indicia which was owned and/or registered by the plaintiff to indicate and identifies the goodwill and reputation of the plaintiff's computer program, ORMSv.6. Further, the plaintiff's case on misrepresentation was not supported by the evidence of the witnesses. Thus, the plaintiff had failed to establish the tort of passing off against the defendants (see paras 33 & 37).

(3) On the facts, the plaintiff had not identified what was the information which was deemed to be confidential; hence, the plaintiff's own pleaded case did not support the claim for breach of confidential information. Assuming that the trade secret lay in the 'confidential information' of ORMSv.6, that it was communicated during the course of employment, the plaintiff had failed to establish that there was an unauthorised use of the alleged confidential information because there was no evidence that the defendants had copied the plaintiff's ORMSv.6. Therefore, based on the reasons, the plaintiff had failed to establish a claim based on breach of confidence or confidential information against the defendants (see paras 42–43, 48 & 51).

(4) On the factual matrix of the case, the entire basis for the plaintiff's allegation of conspiracy against the defendants was based on suspicion. The plaintiff had failed to produce evidence that there was a combination or agreement between the defendants to set up the first defendant with the intention to injure the plaintiff. With regards to damages, the plaintiff had failed to establish that the terminations by Kenanga Investment Bank Bhd and Public Investment Bank were caused by the defendants. In conclusion, the plaintiff had failed to prove its case against the defendants on the claim as pleaded (see paras 57 & 60–62).

**[Bahasa Malaysia summary**

Plaintif telah mendakwa bahawa ia adalah pemilik program computer dikenali sebagai 'ORMSv.6' manakala defendan pertama mendakwa pemilikan program computer dikenali sebagai Penasihat Risiko Kewangan (PRK) Pengurusan Risiko Pengawasan Pasaran ('PRK'). Perlu ditekankan bahawa defendan-defendan kedua, ketiga dan keempat ialah bekas pekerja plaintif dan kini berkhidmat sebagai pekerja defendan pertama. Berdasarkan surat oleh plaintif kepada syarikat dikenali sebagai PM Securities Sdn Bhd, plaintif mendakwa bahawa PRK merupakan sumber kod, skrip dan reka cipta produk plaintif dikenali sebagai ORMSv.6. Berikutan itu, plaintif telah memulakan guaman ini terhadap defendan-defendan menuntut untuk relif-relif injunksi dan ganti rugi atas alasan: (a) pelanggaran hak cipta; (b) kelirupaan; (c) pelanggaran maklumat sulit; dan (d) konspirasi untuk mencederakan. Bagi menyokong tuntutannya untuk pemilikan ORMSv.6, plaintif bergantung kepada keterangan PW1 bahawa plaintif telah membeli ORMSv.6 dari sebuah syarikat dikenali sebagai Global Intelligence ('Global'), namun demikian, keterangan PW1 tidak dipli dalam penyataan tuntutan plaintif yang dipinda. Berhubung ganti rugi, plaintif menuntut ganti rugi spesifik berjumlah RM5.5 juta yang timbul daripada penamatan kontrak oleh Kenanga Investment Bank Bhd; dan RM4.5 juta yang timbul daripada penamatan oleh Public Investment Bank.

**Diputuskan,** menolak kes plaintif dengan kos:

(1) Plaintif telah gagal membuktikan bahawa ia adalah pemilik hak milik ORMSv.6 kerana keterangan yang ia memilik hak cipta itu selepas membeli yang sama daripada Global tidak boleh diambil kira kerana ia tidak dipli. Tiada keterangan untuk membuktikan plaintif adalah pemilik ORMSv.6. Selanjutnya, tiada keterangan langsung untuk membuktikan suatu pelanggaran. Tiada analisis dibuat pada kedua-dua program computer itu bagi tujuan menentukan persamaan yang substantif, apabila dilihat secara objektif. Atas premis itu, plaintif telah gagal untuk membuktikan pelanggaran hak cipta program komputernya oleh defendan-defendan (lihat perenggan 18, 20 & 31).

(2) Berhubung kelirupaan, tiada tanda, tanda niaga, cara gaya atau indicia lain yang dimiliki dan/atau didaftarkan oleh plaintif untuk menunjukkan dan mengenal pasti nama baik dan reputasi program komputer plaintif, ORMSv.6. Selanjutnya, kes plaintif berhubung salah nyata tidak disokong oleh keterangan saksi-saksi. Oleh itu, plaintif gagal membuktikan tort kelirupaan terhadap defendan (lihat perenggan 33 & 37).

(3) Berdasarkan fakta, plaintif tidak mengenalpasti maklumat yang dianggap sulit; justeru, kes plaintif sendiri yang dipli tidak menyokong tuntutan untuk pelanggaran maklumat sulit. Dengan mengandaikan bahawa

rahsia perniagaan terletak pada 'confidential information' ORMSv.6, yang ia telah bahawa ia telah disampaikan semasa menjalankan pekerjaan, plaintif telah gagal membuktikan bahawa terdapat penggunaan yang tidak dibenarkan tentang maklumat sulit yang dikatakan itu kerana tidak ada bukti bahawa defendan telah meniru ORMSv.6 plaintif. Oleh itu, berdasarkan sebab-sebab tersebut, plaintif gagal membuktikan tuntutan berdasarkan ketidakyakinan atau maklumat sulit terhadap defendan (lihat perenggan 42–43, 48 & 51).

(4) Berdasarkan matriks faktual kes itu, keseluruhan asas untuk dakwaan plaintif berhubung konspirasi terhadap defendan-defendan adalah berasaskan syak wasangka. Plaintif telah gagal untuk mengemukakan keterangan bahawa terdapat satu kombinasi atau perjanjian antara defendan-defendan untuk mengenakan defendan pertama dengan niat mencederakan plaintif. Berhubung ganti rugi, plaintif telah gagal membuktikan bahawa penamatan oleh Kenanga Investment Bank Bhd dan Public Investment Bank adalah disebabkan oleh defendan-defendan. Kesimpulannya, plaintif telah gagal membuktikan kesnya terhadap defendan-defendan berhubung tuntutan sepertimana dipli (lihat perenggan 57 & 60–62).]

**Notes**

For cases on computer software, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7602–7604.

For cases on conspiracy to injure plaintiff, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 90–92.

For cases on passing off in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2242–2292.

**Cases referred to**

*Abdul Kudus bin Hj Abd Aziz v Normah bte Cik* [2003] 6 MLJ 169, HC (refd)

*Alfa Laval (M) Sdn Bhd v Ng Ah Hai & Ors* [2008] 5 MLJ 344; [2009] 7 CLJ 1, HC (refd)

*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, HC (refd)

*Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675; [1972] FSR 177, Ch D (refd)

*Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

*Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor* [2012] MLJU 1192; [2012] 8 CLJ 645, CA (refd)

*Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (refd)

*Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992, CA (refd)

*Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm*

*Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525; [2009] 8 CLJ 130, HC (refd)
*Navi & Map Sdn Bhd v Twinice Sdn Bhd and Ors* [2010] MLJU 1210; [2011] 7 CLJ 764, HC (refd)
*Onestop Software Solutions (M) Sdn Bhd & Anor v Masteritec Sdn Bhd & Ors* [2009] 8 MLJ 528; [2009] 1 LNS 287, HC (refd)
*Petraware Solutions Sdn Bhd & Anor v Readsoft Aktibolag & Anor* [2013] MLJU 1606; [2014] AMCR 112, CA (refd)
*Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, HC (refd)
*Reckitt and Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873, HL (refd)
*SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393, CA (refd)
*Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157, CA (refd)

**Legislation referred to**

Copyright Act 1987 ss 3, 42
Evidence Act 1950 s 101

*Walter Pereira (T Geetha with him) (Kamarudin & Partners) for the plaintiff.*
*ET Low (Albert Khoo with him) (Cheong Wai Meng & Van Buerle) for the defendants.*

**Azizah Nawawi J:**

INTRODUCTION

**[1]** The plaintiff sued the defendants jointly and/or severally for injunctions and damages premised on the following causes of actions:

(a) copyright infringement;

(b) passing off;

(c) breach of the non-disclosure agreement and/or confidential information; and

(d) conspiracy to injure the business of the plaintiff.

**[2]** After a full trial, this court has dismissed the plaintiff's case with costs.

THE SALIENT FACTS

**[3]** The plaintiff is a company incorporated in Malaysia with its business address at Suit 20B, Tingkat 20, UBN Tower, Jalan P Ramlee, Kuala Lumpur. The plaintiff is a company that deals with 'software developer and systems consultants'.

**[4]** The first defendant is a company incorporated on 8 January 2013 in Malaysia with its business address at Unit TA-13–1, Level 13A, Plaza 33, Jalan Kemajuan, Section 13, Petaling Jaya, Selangor Darul Ehsan.

**[5]** The second, third and fourth defendants were the former employees of the plaintiff. They are currently working with the first defendant.

**[6]** The plaintiff claims to be the owner of a computer program called 'ORMSv.6', which is a specialised risk management programme which manages risks for investment banks and broking houses in real time. The ORMSv.6 programmed is described as:

> ORMSv.6 allows investment banks to control risk in real time and provides decision support by engaging each risk event in real time. it also becomes clear that a series of decisions and actions in real time created a new universe of risks engagements that were an alternative to underwriting risk models. Therefore, the previously impossible real time risk management is resolved by the plaintiff's software that provided protection to investment banks from large losses and failed opportunities.

**[7]** The first defendant provides technical services in respect of 'Software Solution' in the computer program industry to the commercial banks. The first defendant claims ownership to a computer program called the Financial Risk Adviser ('FRA') Market Surveillance Risk Management. The first defendant claims that the FRA is not just a 'Risk Management' system but is a total system that includes a 'System Surveillance' which can detect and protect market manipulation.

**[8]** In a letter dated 20 January 2015, the plaintiff wrote to PM Securities Sdn Bhd and said as follows:

> ...
>
> Dear Sirs,
>
> Discovery of Capital Market Risk Adviser Sdn Bhd Product theft by offering for sale of Risk-X Sdn Bhd product ORMS as their own.
>
> We thank you for your time in attending our demonstration today.
>
> *We were outraged that the product Capital Market Risk Adviser Sdn Bhd that was proposed by them was a source code, scripts and design of our product known as ORMS V6 in the regional market.* Your comment indicates that the ORMS product was

being claimed as their product that they had claim writing the software from scratch in less than a month. ... (Emphasis added.)

**[9]** In a letter dated 5 February 2015, the solicitors acting for the first defendant, wrote to the plaintiff, making reference to the above letter issued by the plaintiff to PM Securities, and ask the plaintiff to retract the said letter, failing which legal proceedings will be commenced.

**[10]** The plaintiff then issued a notice of demand against the second, third and fourth defendants seeking damages arising out of an alleged breach of non-disclosure agreement whilst they were under the employment of the plaintiff. The gist of the plaintiff's complaint is that the second, third and fourth defendants have '... taken the software ORMS V6, whereby you have without permission taken, adopted, copied or passed off the said software which our client had developed to be used for the purpose attracting investment Banks and financial institutions into believing that the said software was developed by you, and/or by the company, Capital Market Risk Adviser Sdn Bhd'.

**[11]** The plaintiff then filed this suit against the defendants for infringement of copyright, passing off, breach of confidential information and conspiracy to injure. The plaintiff claims for injunctive reliefs and damages.

## THE FINDINGS OF THE COURT

### *Copyright*

**[12]** In para 7 of the amended statement of claim ('amended SOC'), the plaintiff pleads that it owns copyright in the software programme, ORMSv.6. In para 15, the plaintiff pleads that the defendants have taken and copied ORMSv.6 causing loss to the plaintiff. Therefore, the plaintiff claim for an injunction and damages against the defendants premised on an infringement of the plaintiff's copyright in the software programme, ORMSv.6.

**[13]** In order to establish a claim of copyright infringement, the onus is on the plaintiff to establish, on the balance of probabilities, the following elements:

(a) whether the plaintiff's computer programme 'ORMSv.6' is eligible for copyright protection;

(b) whether the plaintiff owns the copyright in the plaintiffs' computer programme 'ORMSv.6'; and

(c) whether the defendant has infringed the plaintiff's copyright.

**[14]** It is not in dispute that under s 3 of the Copyright Act 1987, a computer programme is eligible for copyright protection. In *Onestop Software Solutions (M) Sdn Bhd & Anor v Masteritec Sdn Bhd & Ors* [2009] 8 MLJ 528; [2009] 1 LNS 287, the court held that:

> The case of *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors* [1997] 2 MLJ 429 (at p 437) affirms that *a computer programme is a literary work. It comprises of source codes which are literary works.* A computer programme also comprises non-literal elements which are protected under the law.

**[15]** Next issue is to ascertain the ownership of the copyright, because it is only the owner of the copyright computer programme who can claim for copyright infringement. The plaintiff has pleaded in para 7 of the amended SOC is that the 'Plaintiff is the owner of the computer programme 'ORMSv.6'.

**[16]** However, the issue is whether the plaintiff has proven on the balance of probability that it is the copyright owner of the computer programme 'ORMSv.6'. The plaintiff did not rely on s 42 of the Copyright Act 1987, in order to establish prima facie proof of copyright. Thus the plaintiff must then establish its ownership to the copyright of the computer programme 'ORMSv.6' pursuant to s 101 of the Evidence Act 1950.

**[17]** It is the evidence of PW1 that the 'plaintiff purchased from Global ORMS product and continued the business of Risk Management ...'. However, as conceded by learned counsel for the plaintiff, this was not a pleaded issue in the amended SOC as learned counsel is of the opinion that there is no necessity to plead the same.

**[18]** I am of the considered opinion however that the plaintiff has failed to establish that it is the copyright owner of the computer programme 'ORMSv.6' because the evidence that it owned the copyright after purchasing the same from Global cannot be considered as it is not a pleaded case. It is trite that parties are bound by pleadings and therefore the plaintiff cannot now raise such issue which was not pleaded. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, the court held as follows:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected.

**[19]** In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy*

*& Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, the Federal Court held that:

> [89] It is trite law that parties are bound by their pleadings and the trial of the suit must confine to the pleadings. The court is not entitled to decide a suit on a matter that has not been pleaded.

**[20]** Therefore, the plaintiff must establish the factual matrix as to how it becomes to be the copyright owner of the computer programme 'ORMSv.6'. On the factual matrix of this case, I find that there is no evidence to prove the plaintiff's copyright owner of the computer programme 'ORMSv.6', apart from the single statement by PW1 that the plaintiff has purchased the computer programme from Global. In the premise, I find that the plaintiff has failed to establish that it has the locus standi to commence this action premised on copyright infringement.

**[21]** However, if I am wrong in such finding and assuming that the plaintiff is the owner of the copyright in the computer programme 'ORMSv.6' after having purchased the same from Global, the next issue to consider is whether the plaintiff has proven on the balance of probability, that the defendants have infringed their copyright.

**[22]** In *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525; [2009] 8 CLJ 130, Low Hop Bing J set out three elements to prove direct infringement:

(a) that there is sufficient objective similarity between the original work or a substantial part thereof, and the infringing copy;

(b) that there is causal connection between the original work and the infringing copy, that is, the infringing copy have been copied from the original work, whether directly or indirectly; and

(c) that what has been infringed must constitute a substantial part of the original work.

**[23]** Bearing in mind that the subject matter of this suit is a computer programme, it is not in dispute that the burden lies with the plaintiff to prove that there is substantive similarity between the plaintiff's computer programme and the defendant's computer programme. In *Navi & Map Sdn Bhd v Twinice Sdn Bhd and Ors* [2010] MLJU 1210; [2011] 7 CLJ 764, Azahar Mohamed J (as he then was) stated at p 770 (CLJ):

> [5] ... It is trite law that he who asserts must prove. Hence the *burden of proof lies squarely with the plaintiff to prove that these files were identical in content to the works*

*in which the plaintiff is asserting its copyright*.

**[24]** The only evidence offered by the plaintiff to establish identical or substantive similarity is the alleged statement from an officer of PM Securities that the defendant's computer programme look the same as the plaintiff's computer programme. In para 7 of the plaintiff's written submission, the plaintiff submits that:

> 7. The Plaintiff learned from one of their prominent customers after doing a demo of their software from PM Securities, wherein one of the officers in PM Securities stated that the Defendants had a demonstration of their software and they *were similar* with the Plaintiff ORMSV6 ...

**[25]** The plaintiff then relied on the minutes of meeting of the demo, the exchange of emails and the alleged statements made by the officers in PM Securities that the defendant's computer programme looks the same as the plaintiff's computer programme.

**[26]** However, I am of the considered opinion that bearing in mind that we are dealing with computer programme, evidence must be led to explain what the plaintiff's 'ORMSv.6' programme is and then to make a comparison of the same with the defendant's computer programme in order for the court to ascertain and make a finding on the objective similarity between the plaintiff's original work or a substantial part thereof, and the alleged infringing copy.

**[27]** Witnesses who know about computer programmes or persons who are experts in computer programmes must come to court to explain the substantive similarities in the both programmes. Only then can this court come to a finding of substantive similarity. We are not dealing with a simple copyrighted picture here, where the court can see and make the comparison with the naked eyes.

**[28]** In *Navi & Map Sdn Bhd*, the case involves a copyright action involving published maps data, both in print and in digital format. In this case experts from Cyber Security Malaysia was called to give evidence and to make the comparison between the two products. But the experts did not go into the details of the file and merely rely on the hash values and such evidence was not accepted by the court on the issue of objective similarity. The court said this:

> [5] Learned counsel for the plaintiff argued the hash value analysis provided by the Cyber Security Malaysia experts is the strongest possible evidence to show that there were clear infringement of the plaintiff's copyright. I do not think it is right to resolve the issue by so simple a method. *In this regard, PW2 admitted that he did not compare the content of the files but only the hash values and did not adduce any evidence as to the content of the files with identical hash values found primarily in the external*

*hard disc drive brought to Cyber Security by PW6, the fifth defendant external drive disk, the fifth defendant's note book and the plaintiff's servers although it has ample opportunity to do so since it filed this suit in 2006. The court cannot assume that the identical hash number files have anything to do with the works in question without any evidence being adduced* ... (Emphasis added.)

**[29]** In fact, the head of the information technology ('IT') of PM Securities, Mr Harginder also said in evidence that in order to prove that the two programmes are the same, one has to do a proof of concept, 'POC'. In such a situation, both products must be analysed in order to ascertain whether one computer programme is substantively similar with the other computer programme. In his evidence, Mr Harginder ('PW9') said this:

ETL: Alright. You did say that, you did talk about this similarity. I want you to explain to the court what do you mean by it?

HARGINDER: It's a general statement of similarity, alright. You will see kind of a product like you see Excel and you see Google Excel, they look similar.

ETL: I see.

HARGINDER: *Ok, but they come from two different source. In order to prove that they are the same, you have to do a POC, proof of concept that they come from the same source. So that is not my expertise.*

...

YA: *Proof of concept.* What does that entail?

HARGINDER: *I have to run through the whole process of the application. Functionality.*

ETL: Functionality.

HARGINDER: *Everything. Its a complete.*

...

YA: *So that you can ascertain whether one system is similar to the next system.*

HARGINDER: *Yes*

ETL: *So to do that you need two products to be analysed. Is that correct?*

HARGINDER: *That's right.*

ETL: *Alright. But in this case, was that done?*

HARGINDER: *No.*

**[30]** The Court of Appeal held in *Petraware Solutions Sdn Bhd & Anor v Readsoft Aktibolag & Anor* [2013] MLJU 1606; [2014] AMCR 112 that after making an objective assessment, and after closely scrutinising the comparative screenshots of the graphic interfaces, the evidence before the court could not

support the conclusion that there was infringement. There were some similarities, but viewed as a whole, they look different. Again, in this case, there must be evidence before the court on the comparison between the two computer programmes before the court can make a finding of substantive similarity, which is one of the ingredients to establish copyright infringement.

**[31]** In this case there is no evidence at all to establish an infringement. There was no analysis made to both computer programmes in order to ascertain the substantive similarity, when viewed objectively. In the premise, I find that the plaintiff has failed to prove copyright infringement of its computer programme by the defendants.

*Passing off*

**[32]** The plaintiff also claims damages from alleged passing off of their computer programme by the defendant. In respect of passing off, the Court of Appeal in the case of *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor* [2012] MLJU 1192; [2012] 8 CLJ 645 has applied the House of Lords decision in *Reckitt and Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873, where it was held that in order to establish an action for passing off, the plaintiff must prove the following:

(a) that he has sufficient reputation or goodwill in the *mark, trademark, get-up* or *other indicia* in question under which his particular goods or services or offered to the public;

(b) he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to belief that goods or services offered by him are the goods services of the plaintiff; and

(c) he must demonstrate that he suffers or had suffered or is likely to suffer damage or injury to his business or goodwill by reason of the erroneous belief and engendered by the defendant's misrepresentation that the source of the defendant's good or services is the same of the source offered by the plaintiff.

**[33]** In the present case, there is no *mark, trademark, get-up* or *other indicia* which is owned and/or registered by the plaintiff to indicate and identifies the goodwill and reputation of the plaintiff's computer programme, ORMSv.6. If the plaintiff is relying on the name of the programme, that is ORMSv.6, the defendant's product (known as the FRA) is not identical or anything similar to ORMSv.6.

**[34]** Added to that and with regards to goodwill and reputation, PW1 said that the plaintiff has five customers using the ORMSv.6 programme. Under

cross-examination, PW1 also agreed that there are about 30 broking houses (which include investment banks) in Malaysia. Therefore, the trading activities of the plaintiff cannot be said to be very extensive so as to generate goodwill and reputation.

**[35]** The next element of passing off is misrepresentation. In *Reckitt and Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873, Lord Oliver held as follows:

> Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether intentional or not) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant ...

**[36]** In para 19 of the amended SOC, the misrepresentation as pleaded by the plaintiff is that the second, third and fourth defendants have passed off the plaintiff's ORMSv.6 by:

(a) giving an impression that the ORMSv.6 is developed by the first defendant;

(b) recommended to Public Investment Bank that the said software is new, leading to Public Investment Bank to use the defendant's programme and terminated its negotiation with the plaintiff;

(c) declare to Public Investment Bank that the first defendant's software belongs to the first defendant and that it is the same as the ORMSv.6; and

(d) conduct demonstration on OMRSv.6 to PM Securities and misrepresented to them that the programme belongs to the first defendant.

**[37]** However, having considered the evidence, I am of the considered opinion that the plaintiff's case on misrepresentation is not supported by the evidence given by the subpoenaed witnesses from the Public Investment Bank. My reasons are as follows:

(a) Lim Jit Seng, the Head of Operation of Public Investment Bank confirmed that they are only interested in the surveillance system and that they have approached the first defendant for such system;

(b) Yong Wai Choon, the System Development Manager of Public Investment Bank testified that both the plaintiff and the first defendant have conducted demonstration of their products to the Public Investment Bank. However, the bank has selected the FRA system from the first defendant instead of the ORMSv.6 from the plaintiff because the FRA system suited their needs, and is better system based on function, technical and vendor support; and

(c) as to the evidence of Mr Harginder from PM Securities, he has admitted that the statement on similarity was made as a general statement, and that until the proof of concept has been made, he cannot verify the alleged similarity.

**[38]** Therefore, based on the reasons enumerated above, I am of the considered opinion that plaintiff has failed to establish the tort of passing off against the defendants.

*Breach of the non-disclosure agreement and confidential information*

**[39]** The plaintiff's cause of action against the second, third and fourth defendants is grounded on the alleged breach of confidence and confidential information.

**[40]** It is trite that the plaintiff can only succeed in an action for breach or infringement of plaintiff's right where the defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff without the consent, express or implied of the plaintiff. Bullen & Leake & Jacob's in the book *Precedents of Pleading* (17th Ed) noted that four requirements may be identified:

(a) the claimant must identify clearly the information which is alleged to be confidential;

(b) the information itself must have 'the necessary quality of confidence about it?';

(c) 'that information must have been imparted in circumstances importing an obligation of confidence'; and

(d) 'there must have been an unauthorised use of that information to the detriment of the party communicating it'.

**[41]** It is also trite that the particulars of what is alleged to be confidential information must be pleaded. In *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675; [1972] FSR 177, an application for an interlocutory injunction refused because confidential information was not defined.

**[42]** In the present case, the plaintiff has not identified what is the information which is deemed to be confidential. The plaintiff merely pleaded at para 13(d) of the amended SOC under particulars of conspiracy to injure that the second, third and fourth defendants have full knowledge of the 'confidential information' of ORMSv.6. In its prayer at para 25(v) of the amended SOC, the plaintiff seeks to restrain the first defendant from using

such confidential information which is the intellectual property of the plaintiff obtained by the second, third and fourth defendants in ORMSv.6 during their employment with the plaintiff. The defendants have in fact challenged the plaintiff's on lack of particulars or information of the confidential information in their defence at para 11.3, but there was no reply to such challenge even in the plaintiff's reply to the defence.

**[43]** Therefore, the plaintiff's own pleaded case does not support the claim for breach of confidential information. In *Alfa Laval (M) Sdn Bhd v Ng Ah Hai & Ors* [2008] 5 MLJ 344 at p 366; [2009] 7 CLJ 1 at p 23 Ramly Ali J (as he then was) held:

> [64] Paragraph 16.2 of the statement of claim and para 2 of the summons in chambers in asking for injunctive relief again do not identify with any specificity, what confidential information is in question. *Asking for an order in such vague and uncertain in its terms and scope should not be entertained. Information alleged to be confidential must be specific in the sense that it is clear and identifiable as confidential* (see *Amway Corporation v Euruway International Ltd* [1974] RPC 82 at pp 86–87). (Emphasis added.)

**[44]** In any event, it is the plaintiff's case that the employee agreement executed by the third defendant, Lee Lin Ken with Global Intelligence dated 13 May 1999 contained particulars of confidential information in the form of trade secrets, inventions and intellectual property to incorporate this as part of the particulars of the confidential information. However, the said employee agreement was not signed between the third defendant and the plaintiff but with a third party, Global Intelligence. As such, the plaintiff cannot use the said agreement to bind the third defendant. Further, since the said agreement is in Part C of the common bundle of documents where both admissibility and content is disputed, then pursuant to the case of *Abdul Kudus bin Hj Abd Aziz v Normah bte Cik* [2003] 6 MLJ 169, reliance of such agreement will not be accepted by this court.

**[45]** Next the plaintiff relied on the non-disclosure and acceptance of terms of appointment which was signed by the fourth defendant on 2 November 2011. No evidence on the execution of such document by the second and third defendants were produced in court. The plaintiff, however has alleged that both the second and third defendant have signed the said non-disclosure agreement but has failed to prove the existence of such document. Bearing in mind that the onus lies with the plaintiff to prove such fact, on the evidence before me, i find that the plaintiff has failed to establish that both the second and third defendants have signed the non-disclosure agreement.

**[46]** In any event, although the fourth defendant has signed the non-disclosure agreement, it is the evidence of the fourth defendant, both

during examination-in-chief and cross-examination, that he was basically employed in the post project technical support and was not involved at all in the development or marketing of the ORMSv.6 programmes. In other words, the fourth defendant did not deal with any of the technical aspects of the ORMSv.6 at all. Therefore, whatever confidential information which the fourth defendant might have acquired is only restricted to post project implementation support, and not on the ORMSv.6 itself.

**[47]** However, giving the plaintiff's case much latitude and even if we are to assume that the trade secret lies in the 'confidential information' of ORMSv.6, whatever that may be, the plaintiff must still establish the three conditions in order to succeed in an action for breach of confidence. The Court of Appeal in *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157 cited with approval the case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, where Megarry J held that in order to succeed in an action for breach of confidence the plaintiff must establish to the satisfaction of the court the following three conditions, namely:

(a) that the information which the plaintiff is seeking to protect is of a confidential nature;

(b) that the information in question was communicated in circumstances importing an obligation of confidence: and

(c) that there must be an unauthorised use of the information to the detriment of the party communicating it.

**[48]** Assuming that the trade secret lies in the 'confidential information' of ORMSv.6, that it was communicated during the course of employment, I am of the considered opinion that the plaintiff has failed to establish that there was an unauthorised use of the alleged confidential information. This is because there is no evidence that the defendants have copied the plaintiff's ORMSv.6. There is simply no evidence that both programmes are identical or substantially similar. There is no evidence of any analysis made to both programmes in order to ascertain the substantial similarity so as to impute copying, whether directly or indirectly.

**[49]** The plaintiff is relying on the 'theory of implying facts' that the second, third and fourth defendants were employee of the plaintiff and by virtue of their years with the plaintiff they have acquired confidential information. Therefore when they joined the first defendant, they would have copied the plaintiff's product and used them to pinch the plaintiff's customers. They also infer or imply that because of the short period of time the first defendant has taken to develop the FRA therefore they must have copied the plaintiff's ORMSv.6. To me, these are mere speculation and conjectures which cannot stand in court.

**[50]** Added to that, the evidence of PW1 clearly shows that the plaintiff did not even know the name of the product developed by the first defendant. PW1 claimed that he has heard of the first defendant's system FRA for the first time from the prospect before the suit was filed in court. But it must be noted that the name of the system FRA was not even mentioned at all in the plaintiff's amended statement of claim. Therefore, the plaintiff's assertion that the defendants have copied and misappropriated or misused any of the confidential information obtained in ORMSv.6 to develop FRA is baseless given the fact that the plaintiff did not even know nor pleaded the FRA system of the first defendant.

**[51]** Therefore, premised on my reasons above, I find that the plaintiff has failed to establish a claim premised on breach of confidence or confidential information against the defendants.

*Conspiracy to injure the business of the plaintiff*

**[52]** In para 13 of the amended SOC, the plaintiff pleaded that the second defendant has indirectly set up the first defendant on 8 January 2013 and held himself to be the chief executive officer of the first defendant. The plaintiff also pleaded that the third and fourth defendants then ceased employment with the plaintiff and sought employment with the first defendant.

**[53]** ln the Court of Appeal case of *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393, it was held that for the tort of conspiracy, there must be an unlawful object, or if not in itself unlawful it must be brought about by unlawful means. There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. The tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. Therefore, in order to succeed in a claim based on the tort of conspiracy, the plaintiff must establish:

(a) an agreement between two or more persons;

(b) for the purpose of injuring the plaintiff; and

(c) acts done in the execution of that agreement resulted in damage to the plaintiff.

**[54]** Having considered the evidence, I am of the considered opinion that the plaintiff has failed to establish the three elements of the tort of conspiracy. I find that the plaintiff's case is based on mere conjectures. This can be seen from the written submission of the plaintiff at p 89:

> ii. The Plaintiff aver that by looking at the sequence of events from the resignation of the 2nd, 3rd and 4th Defendant, the formation of the 1st Defendant being a

subsidiary of Excel Force Sdn Bhd and joining of the 2nd, 3rd and 4th Defendant with the 1st Defendant is a plan/conspiracy by the 2nd and 3rd Defendant.

viii. The 2nd, 3rd and 4th Defendants have knowledge of ORMS V6 'Confidential Information' and have taken, adopted, copied or passed off the said software which Plaintiff had developed to be used and marketed by the 1st Defendant for the purpose attracting investment Banks and financial Institutions.

...

xi. The Defendant in their Amended Statement of Defence admitted that the 1st Defendant being a subsidiary to Excel Force have use the its name and reputation as an advantage to promote FRA and it did not matter that the 1st Defendant was new in the Market as all Investment Banks have known Excel Force who has more then 10 years reputation. Plaintiff refers to Ikatan Pliding (Bundle A Tab C) which is 'Pembelaan Terpinda Defendan Pertama' paragraph 16.1 (d):

> (d) *Bank-bank pelaburan dan Institusi-institusi kewangan juga adalah pelanggan-pelanggan syarikat ibu (parent company) kepada Defendan Pertama iaitu Excel Force MSC Berhad yang merupakan syarikat yang memberikan perkhimatan software kepada bank-bank dan Defendan Pertama telah mendapat manafaat (benefits) daripada nama baik dan perhubungan rapat Excel Force MSC Berhad dengan pelanggan-pelanggan tersebut. Excel Force telah membina reputasi dan nama baik (goodwill) dikalangan ahli bank-bank dan institusi Kewangan dan ini telah memberikan 'endorsement' kepada programme software yang dimajukan oleh Defendan Pertama dan* Defendan Pertama telah mempergunakan (capitalize) 'reputasi dan nama baik dan perhubungan yang baik ini untuk memasarkan program FRA kepada Bank-Bank dan institusi kewangan.

In fact in the last underlined paragraph above the 1st Defendant is in affect admitting to the conspiracy between the Defendants to setting up the 1st Defendant to promote software known as FRA which is the same as ORMSV6 Plaintiff.

xii. By joining the 1st Defendant who deals with company software just like the Plaintiff; the 1st Defendant is also in the business of Risk Management whether its financial risk or Market Surveillance they all come under the same umbrella which is Risk Management. The 1st Defendant customers are also Investment Banks which is again shows that the competition with the Plaintiff is unavoidable.

**[55]** However, the evidence before this court shows otherwise:

(a) that there was no conspiracy amongst the second, third and fourth defendants to set up the first defendant as the first defendant was set up by Lim Lien Yu and Micheal Teh Kheng Wan on 8 January 2013. The SSM search clearly shows that these gentlemen own 45,000 and 75,000 shares in the first defendant respectively, and the balance of 130,000 shares is owned by the parent company of the first defendant, Excel Force MSC Bhd;

(b) that all the second, third and fourth defendants only joined the first defendant after the first defendant was incorporated by Lim Lien Yu and Micheal Teh Kheng Wan on 8 January 2013, and later became a subsidiary of Excel Force; and

(c) that the second defendant did not resigned from the plaintiff but was terminated from his employment as the regional director of the plaintiff on 7 January 2013 and has since filed a case on wrongful termination against the plaintiff in the Industrial Court.

**[56]** In the case *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992 the court held that 'conspiracy is not always capable of proof by direct evidence. *It is axiomatic that there must be proof and not mere conjecture. Conspiracy cannot be established by hearsay evidence'.*

**[57]** On the factual matrix of this case, I find that the entire basis for the plaintiff's allegation of conspiracy against the defendants was based on suspicion. The plaintiff has failed to produce evidence to show that there was a combination or agreement between the first and the second defendant to set up the first defendant on 8 January 2013 with the intention to injure the plaintiff. Neither has the plaintiff proved that there was an agreement between the third and fourth defendant with the second defendant to set up the first defendant on 8 January 2013 with the intention to injure the plaintiff.

*Damages*

**[58]** Since this case was tried on both issues of liability and damages, I will now deal with the issue of damages. In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 Edgar Joseph Jr J made the following observation:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages maybe awarded in all cases of breach of contract (see *Marzetti v Williams* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages ...

**[59]** In its amended SOC, the plaintiff claimed specific damages in the sum of:

(a) RM5.5m arising from the termination of contract by Kenanga Investment Bank Bhd for lost of subscription and maintenance fees, modification, update and loss of future business; and

(b) RM4.5m for cost of installation, customisation and loss of subscription and maintenance for termination by Public Investment Bank.

**[60]** The plaintiff claims that Kenanga Investment has terminated the contract with the plaintiff but the evidence from the two witnesses from Kenanga Investment, PW4 and PW5 did not establish that the termination was caused by the defendants.

**[61]** As for the claim for alleged loss of RM4.5m due to the termination by Public Investment Bank, two witnesses PW2 and PW3 from Public Investment Bank were called to testify. PW3 gave evidence that Public Investment Bank had actually done their internal evaluation and discover that FRA (the first defendant's system) scored better in terms of functional, technical and vendor support. The termination by Public Investment Bank of the plaintiff's product is a commercial decision by Public Bank and the plaintiff has failed to establish that the termination was caused by the defendants.

CONCLUSION

**[62]** In the premise, I am of the considered opinion that based on the evidence before this court, the plaintiff has failed to prove its case on the balance of against the defendants on the claim as pleaded. The plaintiff's case is hereby dismissed with costs.

*Plaintiff's case dismissed with costs.*

Reported by Dzulqarnain Ab Fatar